(1) 89- 1889

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

CHARLES DeMARTINO,

Petitioner,

-against-

NEW YORK CITY TRANSIT AUTHORITY, HON. DANIEL GUTMAN, Hearing Referee, New York City Transit Authority Trial Board, GEORGE BUCKLEY, Vice President, Labor Relations, New York City Transit Authority, HON. MICHAEL WEIL, Chief of Eligibility Unit, New York City Employees Retirement System, NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, HON. JAMES B. MEEHAN, Chief New York City Transit Police Department, DAVID GUNN, President, New York City Transit Authority, and THE NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED

Question 1.

Whether the New York City Transit Authority and the New York City Transit Authority Police Department Hearing Referee could proceed to try petitioner in June of 1986, a mere civilian with no attenuation of the New York City Transit Authority or its Police Department subsequent to his Termination and Dismissal dated January 31, 1984; and thereby proceeding without *in personam* or subject matter jurisdiction, and through such contrivance deprive petitioner of his property in derogation of his inalienable rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

Question 2.

Whether the New York City Transit Authority and the New York City Transit Authority Police Department Hearing Referee could

proceed to try petitioner in June of 1986, a mere civilian with no attenuation to either Agency subsequent to his Termination and Dismissal dated January 31, 1984; and therewith ignore and effectively vitiate the mandate of the Appellate Division of the State Supreme Court, Second Judicial Department to "VACATE THE PENALTY IMPOSED, ON THE LAW..." dated February 18, 1986; and through such contrivance deprive petitioner of his property in derogation to his inalienable rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

Question 3.

Whether the New York City Transit Authority and the New York City Transit Authority Police Department Hearing Referee could constitutionally proceed at a "Trial" of petitioner where petitioner and his counsel "sat mute," affirmatively refused

to accept the status of a "Hearing" lacking subject matter and in personam jurisdiction over petitioner, a mere civilian with no attenuation to either Agency subsequent to his Termination and Dismissal dated January 31, 1984; and thereby ignore and effectively vitiate the mandate of the Appellate Division of the State Supreme Court, Second Judicial Department to "VACATE THE PENALTY IMPOSED, ON THE LAW..." dated February 18, 1986; and through such contrivance deprive petitioner of his property in derogation of his inalienable rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

Question 4.

Whether the respondents, and each of them, conspired to and did deprive petitioner of his pension, property rights and fundamental rights as a citizen through the execution and filing of knowingly false

affidavits and fraudulent back-time-and-date-stamped official documents with respondent NYCERS and the KIngs County Supreme Court and Appellate Division for the Second Department; all in derogation of his inalienable rignts pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

<u>questions 5.</u>

Whether respondents Gutman and Buckley could lawfully hear and/or determine issues regarding the disciplinary proceeding of petitioner without an affirmative showing that they were each duly "designated in writing" to preside over, hear and/or determine the outcome of petitioner's allegedly lawful "trial", as required by law, and without same having deprived petitioner of his property in derogation of his inalienable rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

Question 6.

Whether the New York City Transit Authority and the New York City Transit Authority Police Department Hearing Referee, presiding over a quasi-judicial tribunal of limited powers, could proceed to try petitioner in June of 1986, a mere civilian with no attenuation to the New York City Transit Authority or its Police Department subsequent to his Termination and Dismissal dated January 31, 1984; by unconstitutionally exceeding his restricted power to try solely a Police Officer of the New York City Transit Authority Police Department, by the contrivance of staging a "trial", and thereby deprive petitioner of his property in derogation of his inalienable rights pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

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Decision of the New York City Transit Authority to terminate petitioner from his position as a Transit Police Officer, dated Janury 23, 1984, to take effect January 31, 1984. New York City Transit Police Department Personnel Order #6.2, dated January 31, 1984, dispositively terminating petitioner's services as a police officer with the Transit Authority, effective Close of Business of January 31, 1984, and signed by John C. Driscoll, Inspector in Command. Decision and Order of Hutcherson, J., Kings County Supreme Court, on index nos. 24426/86 and 15944/86, denying petitioner's application for Article 78 relief in all respects, and dated February 11, 1987. Decision and Order of the Appellate Division, Second Judicial Department, in In Re DeMartino v. Weil, affirming the judgment of Hutcherson, J ., dated April 24, 1989

Decision and Order on Motion to Reargue by the Appellate Division, Second Judicial Department, denying said motion, dated June 28, 1989. Order of the New York State Court of Appeals, dated October 24, 1989, denying leave to appeal.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved:

Fifth Amendment Rights to Not be Deprived of Property Without Due Process of Law;

Fourteenth Amendment Rights to Not be Deprived of Life, Liberty or Property without Due Process and Equal Protection of the Law.

JURISDICTION

The Order of the New York State Court of Appeals denying leave to appeal was entered on October 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257.

PRELIMINARY STATEMENT

The "Personnel Order" really "tells it all."

Charles DeMartino, Police Officer of the New York City Transit Authority, on January 31, 1984 pursuant to the Police Department's "PERSONNEL ORDER" of that date, received his formal Termination notice. (See Appendix, page A-20). That recited, as seen on page of the Appendix, that effective C.O.B. Tuesday, January 31, 1984 his "services ... have been terminated." A following paragraph cogently stated: "Amend all records accordingly."

When on February 18, 1986 the Appellate Division, Second Judicial Department, effectively reversed that Personnel Order emanating from a Departmental Hearing, its ruling was explicit:

> "vacate penalty imposed ... on the law, with costs."

A hearing was duly slated by the New York City Transit Authority Police Department, presumably pursuant to the Order of the Appellate Tribunal, set down for June 26, 1986. "...reconsideration of the issue of an appropriate penalty" was to be the gravamen of the hearing.

Counsel for DeMartino asserted that until the Transit Authority Police Department obeyed the Order of the Appellate Tribunal, to wit. "vacate(d) penalty imposed..." by "cutting a new order", there could be no hearing; DeMartino was a mere civilian pursuant to the Personnel Order of Dismissal of January 31, 1984. NO IN PERSONAM or SUBJECT MATTER JURISDICTION EXISTED FOR A HEARING BEFORE A TRANSIT AUTHORITY POLICE DEPARTMENT REFEREE WITH RESPECT TO A CIVILIAN TERMINATED!

The Hearing Transcript of June 26, 1986 before Referee DANIEL GUTMAN, page 31, has this incredible statement:

> "HEARING REFEREE: ... my decision is based on two factors. One, that the Respondent, Mr. Demartino was still an employee of the Transit Authority ...(emphasis added).

In the name of rationality, how could Mr. DeMartino "still"(sic!) be an employee of the Transit Authority when the Personnel Order of Termination of January 31, 1984 was never revoked, annulled, modified! By what legal alchemy could he be an employee without adherence to the Appellate Division stern admonition: "vacate penalty imposed, on the law, with costs." (emphasis added)

Furthermore, counsel for the petitioner told the Hearing Officer that unless he is on the Transit Authority payroll as a Transit Police Officer, pursuant to the ruling of the Appellate Division on February 18, 1986, there was simply no jurisdiction, power and authority for the Hearing Tribunal to proceed in that, if the petitioner was not on the payroll of the Transit

Authority, he was not reinstated, he was not a police officer, and that the Hearing Officer has no power to hear anything.

Counsel for petitioner further alerted the Hearing Officer that petitioner was not submitting his person to that Hearing Tribunal, as a mere civilian; therefore in personam and subject matter jurisdiction would be lacking.

On or about May 28, 1986 petitioner made application to the New York City Employee Retirement System (NYCERS) to process his retirement from service for July 2, 1986.

NYCERS responded in a letter dated June 17, 1986, to the effect that he (petitioner) could not have his application acted upon because the New York City Transit Authority (NYCTA) had informed NYCERS that petitioner had been terminated since January 31, 1984. Petitioner then forwarded a copy of the Appellate Division's Order vacating the penalty of dismissal to

NYCERS and Weil.

On or about July 1, 1986, petitioner went to the office of NYCERS and applied for an acceleration of his retirement date to July 1, 1986. NYCERS notified NYCTA by telephone concerning petitioner's intentions. NYCTA thereafter back-time stamped an alleged approval of the Hearing Referee's recommendation of dismissal (dated June 27, 1986) by placing the time (sic!) of alleged approval (allegedly 12:00 Noon) on the finding and recommendations. This was done by respondent Buckley. In all the history of the Transit Authority and its Findings, Recommendations and Approvals in Disciplinary Proceedings, the time has never been included, only the date. Afterall, petitioner DeMartino had served 18½ years as a Police Officer. The "hour" of his dismissal was a meaningless recordation!

The only reason it was included this

time was because NYCTA had not yet ruled on the approval of the Hearing Referee's Findings and Recommendations on July 1, 1986 when NYCERS called NYCTA and told them that petitioner was in their offices further accelerating his retirement date to correspond with that date, July 1, 1986. Thus, the conspiracy to deprive petitioner of his pension.

Respondents, on or about November of 1986 caused the knowingly false affidavit of Goerge Buckley, to the effect that he signed the approval of the Hearing Officer's Findings and Recommendations at 12:00 Noon, to be filed in the Kings County Supreme Court along with a knowingly false affidavit from William Buchanan to the effect that he witnessed George Buckley sign the Findings And Recommendations at 12:00 Noon on July 1, 1986. (sic!).

The Kings County Supreme Court, Hutcherson, J., did not rule on this issue

of fundamental importance, nor did the Appellate Division, Second Department on appeal. Both Courts were apprised that petitioner considered these flagrant acts of NYCERS, WEIL and NYCTA respondents gross and egregious violations of his Fifth and Fourteenth Amendment Rights under the U.S. Constitution to not be deprived of his property without due process and equal protection of the laws. Respondents were further apprised that their acts were considered criminal by petitioner and bordered on RICO violations. These contentions were placed before the Kings County Supreme Court, the Appellate Division Second Department and the New York Court of Appeals. All three Courts refused to address this crucial issue. It is now before this pre-eminent Court for resolution.

Reasons For Granting The Writ

Point 1

THE RESPONDENT NEW YORK CITY TRANSIT AUTHORITY DID NOT HAVE SUBJECT MATTER JURISDICTION OR IN PERSONAM JURISDICTION TO HOLD THE REMITTED DISCIPLINARY HEARING OF PETITIONER, ABSENT AN AFFIRMATIVE SHOWING THAT PETITIONER WAS ON THE PAYROLL OF THE TRANSIT AUTHORITY BY "CUTTING" AND ISSUING A PERSONNEL ORDER TO REFLECT PETITIONER'S STATUS AS A TRANSIT POLICE OFFICER; THEREBY MAKING ANY RULING BY TRANSIT AUTHORITY, AND THE RECORD OF ITS PROCEEDINGS UTTERLY VOID AND UNAVAILABLE FOR ANY PURPOSE

The landmark rule of law above cited, as found in Kamp v. Kamp, 59 N.Y. 212, at 218 (1874), is followed by all the leading authorities, both State and Federal. It is significant that Kamp, Id., at 213 also states: "One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times." Most apposite, Kamp, at p.219 stresses: "... judgments by courts having no jurisdiction are as no judgments, and bind no one."

Respecting petitioner's status at the time of the hearing, the cases are legion in support of petitioner's position.

As a matter of law and common understanding, the existing and extant "Personnel Order" of Dismissal, never revoked or modified, was operative on June 26, 1986, divesting the Hearing Officer of subject matter jurisdiction.

The case of Conlon, Petitioner vs. Murphy as Police Commissioner, 44 Misc.2d 504, at 506 (Sup.Ct. Bronx Co. - 1964), is instructive:

> "(Petitioner) (h)aving been removed from his office (member of the police force, as here) effective July 15, he was not a 'member in city-service' as required by section B18-43.0. Thus the respondent board was without power to pass a resolution restoring him. While the Board of Trustees may not question the determination of the Medical Board, it cannot retire a man who is not 'in city-service' at the time they are called upon to pass the retirement resolution. (emphasis added)

In the instant matter NYCERS initially refused to act upon petitioner's retirement application because NYCTA informed NYCERS that petitioner was not a member of the Transit Police Department due to his termination as of January 31, 1984. This glaring admission by NYCERS and NYCTA further proves that NYCTA had no jurisdiction over petitioner, as a CIVILIAN, to discipline or even hold a hearing in regards to him.

Gillott v. City of New York, 662 F.Supp. 171 (S.D.N.Y. 1987), is a lucid analysis of the rationale for denying former police officer a disability pension (p. 176):

> "When the Pension Board considered plaintiff's application on June 20, 1984, it 'no longer had jurisdiction of plaintiff's application because he had been dismissed from the Police Department.' (Agreed Finding of Fact #10.) The Pension Board can decline to act on an officer's disability application when he is not employed by the City at the time the Board considers the application. Glazer v. Board of Trustees of Police Pension, 66 A.D.2d 759,760, 411 N.Y.S.2d 611,612 (1stDep't.1978), affd. mem., 48 N.Y.2d 790, 423 N.Y.S. 2d 923, 399 N.E.2d 953 (1979). (emphasis added)

The leading case of Pierne v. Valentine, 291 N.Y. 333, at 338 (Court of Appeals-1943), surely spoke directly to the issues herein, just as Conlon v. Murphy, 44 Misc.2d 504, at 506 and Gillott v. City of New York, 662 F.Supp. 171, at 176, with the incisive and brilliant analysis by Stanton, J., each supra, so clearly expressed:

> "...Certiorari would not in our opinion be an adequate remedy in this case, and the petitioners might suffer irreparable damages if they were compelled to defend

themselves against the charges if, as a matter of law, they are no longer members of the police department." (emphasis added)

In Pierne v. Valentine, supra, a brilliant analysis by Lehman, Ch.J., speaking for the unanimous Court of Appeals, powerfully found that an order of prohibition to prevent the police commissioner from trying members of the New York City Police Department on charges filed against them after they had filed for retirement, could be feasible only if the commissioner was entirely without jurisdiction to hear and decide the charges!

In 1943, the year of the decision, the commissioner would have no jurisdiction of the subject matter if retirement was accomplished without any resolution by the Board of trustees of the pension fund before charges were filed. (Civil Practice Act, Section 1283 et.seq.; Administrative Code, Secs. B-18-2.0(a), B18-4.0.) The law was such at the time of decision that a member

of the New York City Police Department after completion of his required period of service "shall be retired upon his own application." In short, unlike current Administrative Law, retirement on a pension was effectuated by mere filing of an application without any action thereon by the Board of Trustees. (Administrative Code, Sec. B18-4.0(c).)

Here, the doctrine that the law follows the facts (Amoruso v. New York City Transit Authority, 12 A.D.2d 11; Wormser, Disregard of the Corporate Fiction, pp. 10-11, is uniquely applicable. Simply - but dramatically stated: THE HEARING REFEREE FOR THE NEW YORK CITY TRANSIT AUTHORITY POLICE DEPARTMENT HAD BEFORE HIM CIVILIAN CHARLES DeMARTINO! That was and is the inescapable fact. The law thus must follow that startling fact: Provide, truly and legally, a "hearing" for Charles DeMartino before the said Authority; an Authority having subject matter jurisdiction - without which its "rulings" are nullities.

"Jurisdiction," the Second Circuit ruled, "is the authority to hear and determine a cause; it is, in essence, the power to adjudicate the action. Farmers Elevator Mut.Ins.Co. v. Austad & Sons, Inc., 343 F.2d 7,11 (8thCir.1965). "If a court lacks jurisdiction over an action, it lacks the power to act with respect to that action." (p.20, 412 F.2d). And, as the New York Court of Appeals stated: "No court or judicial officer can acquire jurisdiction by the mere assertion of it, or by erroneously alleging the existence of facts upon which jurisdiction depends. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth entitled to the character of a judgment." O'Donoghue v. Boles, 159 N.Y. 87,98, 53 N.E. 537,539,540.

In United States v. Griffin, 303 U.S. 226 (1938), this Court stressed that lack of jurisdiction of a federal

court touching the subject matter of the litigation cannot be waived by the parties. United States v. Corrick, 298 U.S. 435, 440. Upon reconsideration, the Court reversed itself and directed that the bill be dismissed. And, in Ahrens v. Clark, 335 U.S. 188, at 193 the Court ruled equally persuasive as to the case at bar. "Since there is a defect in the jurisdiction of the District Court which remained uncured, we do not reach the question whether the Attorney General is the proper respondent (citing cases), and, if not, whether the objection may be waived, as respondent is willing to do. Cf. Ex Parte Endo, 323 U.S. 283, 305, 65 S.Ct. 208, 220, 89 L.Ed. 243.

No act of Congress can authorize a violation of the Constitution. U.S. v. Brignoni Ponce, 95 S.Ct. 2574, 422 U.S. 873. But here, a mere Agency of the City of New York, to wit, Transit Authority

Police Department, defied Due Process and Equal Protection of the Law as concerns Charles DeMartino, an 18½-year veteran Police Officer when he was "terminated" and dismissed January 31, 1984. Here, the Sovereign, through its agency, engaged in taking of DeMartino's most valuable property right (his pension) without a semblance of the Constitutional protections guaranteed him under the Fifth and Fourteenth Amendments to the U.S. Constitution. An employee such as petitioner herein, may demand the procedural protections of Due Process, Connell v. Higginbotham, 403 U.S. 207 (1971); Weiman v. Updegraff, 344 U.S. 183, 191-192 (1952). Without subject matter jurisdiction and jurisdiction of the person of petitioner obtained by this very limited Tribunal, there was nothing less than a taking of property without either Due Process or Equal Protection of the Laws. Grannis v. Ordean, 234 U.S. 385

(1914): Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168-169 (1951).

Equal Protection of the Laws is the command of the Fourteenth Amendment that no "State" shall deny to any person within its jurisdiction. Whoever, by virtue of public position under a State Government or as here a City Government, is clothed with the power of the Sovereign. His act is that of the Sovereign he represents. "This must be so, or the constitutional prohibition has no meaning." Ex Parte Virginia, 100 U.S. 339,347. Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State, and its Agency, the NEW YORK City Transit Authority Police Department herein, denying equal protection of the laws; whatever the agency of the City or State taking the action. See, e.g., Virginia v. Rives, 100 U.S. 313; Shelley v. Kramer, 334 U.S. 1; or "whatever the guise in

which it is taken," Darrington v. Plummer, 240 F.2d 922 (5thCir.); Dept of Conservation v. Tate, 231 F.2d 615 (4thCir.).

Instructively, the equal protection of the laws cannot be withheld, merely because the Court may deem a criminal defendant innocent or guilty. Hill v. State of Texas, 316 U.S. 400, 406. Here, an Officer of the Law for 18½ years when he was dismissed, receives the Appellate Division, Second Department's right to have the penalty determination aspect of his hearing retried because basic rights were denied him at the initial hearing; but the Transit Authority refuses to "vacate penalty imposed," thus negating the Appellate Division's reversal of the January 31, 1984 dismissal and treating its Order with disdain and contempt. Thereby, they were unable to afford the ordered re-hearing because they refused to "vacate penalty imposed"

(of dismissal). They could never have or even pretend to sustain subject matter jurisdiction thereon of a mere civilian! Surely, such action directly removed the Constitutional right to Due Process and Equal Protection of the Laws afforded Charles DeMartino as a fundamental American right!

Point 2

FAILURE OF REFEREE GUTMAN AND VICE PRESIDENT BUCKLEY TO BE "DESIGNATED IN WRITING" TO HEAR AND DETERMINE, RESPECTIVELY, THE REMITTED DISCIPLINARY PROCEEDING FURTHER DIVESTED THE NEW YORK CITY TRANSIT AUTHORITY OF IN PERSONAM AND SUBJECT MATTER JURISDICTION; CONSEQUENTLY, THEIR RULINGS ARE NULL AND VOID AND VIOLATE PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE U.S. CONSTITUTION

It is vividly apparent upon a reading of other leading cases - especially those of this Constitutional defining Court in this fundamental area - that the Hearing Officer's silence in the face of the overwhelming case law shown him is an admission he could not respond in a legally disparate manner. The Appellate Division, First Department spoke to the Referee and the Justices below in 1904, People v. Green, Police Com'r. of New York City, 97 App.Div. 404, 89 N.Y.S. 1067, at 1069 and 1070:

"... When the police commissioner or either of his deputies undertakes a trial of a police officer upon charges, he constitutes a court of inferior jurisdiction. There is no presumption of jurisdiction in favor of the acts of inferior courts. An inferior court must, when questioned, show that it acted within its jurisdiction (Yates v. Lansing, 9 Johns 396, 437, 6 Am.Dec. 290, cited and recognized in Smith v. Central Trust Co., 154 N.Y. 333, 340, 48 N.E. 553 ... and this requires that the record of such court should show all facts essential to the jurisdiction ... when the trial is conducted by a deputy commissioner, as in the case now before us, the record should show by what authority the deputy is acting."

..."the rule for jurisdiction is that ... nothing shall be intended to be within the jurisdiction of an inferior court but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." Peacock v. Bell, 1 Saund. 73,75.

..."where the record fails to show the jurisdictional facts it is fatally defective. (all emphasis added)

NOTE: All the jurisdictional lacunas occurred herein!

The leading case, Blount v. Forbes, 250 App.Div. 15, 293 N.Y.S. 319 (1st Dept.1937), is equally emphatic that, as hereinbelow where neither Referee Gutman nor Vice President, Labor Relations George Buckley was "designated in writing for that purpose." (293 N.Y.S., at 321). That such requirements are jurisdictional, with "failure to comply with either is fatal to the proceeding." People ex rel. Hayes, 212 N.Y. 156; People ex rel. Dougan v. Green, 97 App.Div. 404, 89 N.Y.S. 1067.

Blount, supra, repeats the vital essence of the omission herein in the case at bar (p.322-323 of 293 N.Y.S.):

> "When a commissioner or his deputy undertakes the trial of a subordinate on charges, he constitutes a court of inferior jurisdiction. People ex rel. Allen v. Knowles, 47 N.Y. 415; People ex rel. Waldon v. Soper, 7 N.Y. 428, Bullymore v. Cooper, 46 N.Y. 236. ... Consequently, if the requirements of the statute that designation of a deputy shall be "in writing" or that ... the deputy who had heard the charges should

> make recommendations before final action by the commissioner, who had had no opportunity to observe the witnesses."

Here, of course, vehement and repetive objection was made to the lack of in personam and subject matter jurisdiction by the inferior tribunal below. "Moreover, the total want of jurisdiction to entertain the proceeding would not be waived by failure to object upon that ground." People ex rel. Mayer v. Warden of Nassau County Jail, 260 N.Y. 426; Benson v. Eastern Building & Loan Ass'n, 174 N.Y. 83; Matter of Langslow, 167 N.Y. 314,321; Cancemi v. People, 18 N.Y. 128; Hughes v. Cumming, 165 N.Y. 91; Oakley v. Aspinwall, 3 N.Y. 547.

In People ex rel. DeVries v. Hamilton County Clerk, 84 App.Div. 369, 82 N.Y.S. 884 the rule of compelling significance to the issues herein is unerringly set down. (84 App.Div., at 886, 887):

The difficulty which the case presents lies in the fact that the deputy, (herein, Gutman) having entered upon the trial, did not continue to perform the duties which had been devolved upon him to a conclusion. In hearing and determining upon the sufficiency of the proof in support of the charge, the deputy acted in a quasi-judicial proceeding, and exercised judicial authority in reaching a conclusion, upon the weight of the testimony, the extent and character of the punishment which should be imposed. We are cited to no authority, ... nor have we found any, either statutory or otherwise, authorizing a deputy to perform the duties of his chief, take the proof offered upon the hearing, and then pass the proceeding over to the clerk to make the determination. ... In the orderly course of judicial procedure a trial may not be severed so that one functionary may take the proof and another make the determination. Such power has never been exercised, so far as we are aware, unless it was conferred by statutory enactment. (emphasis added)

...

And, while the authority is imposed upon the officer, it continues and remains with him to the end, and he alone, in the absence of authority authorizing a different course, must continue to exercise the powers and make the final determination.

Referee Gutman, in his "Statement and Recommendation" in the instant case dated June 27, 1986, revealingly set forth the reasons why this Supreme Judicial Tribunal must rule in conformance with the leading Court of Appeals of the State of New York and Appellate Division cases cited, supra. Merely repeating the Referee's expressed views suffices to show the jurisdictional defects:

> "I have reconsidered the original recommendation of discharge. I have listened to the argument advanced by able Counsel for each of the parties, and have reviewed the memoranda submitted by them on the basis of the proven charges, which were the subject matter of the original hearing. As considered independently and in conjunction with the annexed portions of Respondent's personnel file which were presented at the hearing and were previously provided to respondent's counsel, I am constrained to adhere to the original determination herein, and to recommend that Charles DeMartino be dismissed from the service of the Transit Authority.
>
> "There was some discussion at the hearing of June 26th, 1986, concerning the effective date of the said Respondent's dismissal. In my opinion, that is not a matter for me to determine."

In the related case before Justice Hutcherson, duly dated November 7, 1986, this Counsel duly submitted in his affidavit of that date, the specifics as to the jurisdictional defect in the above cited rulings by Gutman, Referee. For continuity, pages numbered "49" and "50" therein are repeated and the entire affidavit is respectfully found as #3 in the within appendix:

> Morgan v. United States, 298 U.S. 468 (1935) and its legal progeny are fully relied upon. See, also, Greene v. McElroy, 360 U.S. 474, 497. This Court, it is most respectfully (urged), should admonish Mr. Schiffrin and the Transit Authority that this latest plot is an affront to civilized standards; that it will not be tolerated by this fair-minded, scrupulous Justice of the Supreme Court of the State of New York.
>
> Other indicia of magnitude (are) revealed by the failure to comply with Civil Service Law, Sec. 75(2).
>
> A. They have nowhere met their non-delegable duty of asserting and timely proving that Buckley was delegated to determine the instant matter. Todriff v. Shaw, 95 A.D.2d 775, 463 N.Y.S.2d 257 (2d Dept.)

B. Referee Gutman was designated in writing by NO ONE IN THIS SPECIFIC CASE TO HEAR THE CASE AS A REFEREE. Such failure of jurisdiction was egregious. See, e.g., Wiggins v. Bd/Ed of the City of New York, 60 N.Y.2d 385 (1983). That Per Curiam opinion strikingly points up the glaring paucity of credentials of the Hearing Referee and the surrogate he commandeered, effectively in the person of George Buckley, Vice President, Labor Relations. The Court of Appeals herein could not have ruled more eloquently as to the mandated ruling herein (pp. 469 N.Y.S.2d, at 653-654):

"In the absence of a written delegation authorizing a deputy or other person to conduct the hearing, the removing board or officer has no jurisdiction to discipline an employee (See Matter of Blount v. Forbes, 250 App.Div. 15, 293 N.Y.S. 319; Locust Club v. City of Rochester, 48 Misc.2d 763, 767, 265 N.Y.S. 2d 744; Matter of Morrison v. Moses, 172 Misc. 129, 14 N.Y.S.2d 67; Matter of Klein v. Dept. of Mental Hygiene, 15 A.D.2d 562, 222 N.Y.S. 2d 1010 (matter remanded for evidence of written designation)). This is the logical conclusion of the fact that in the absence of a written designation, the deputy or other person has no power to conduct the hearing and, consequently, his or her report is a nullity. Without a report or other factual findings, the removing board or officer has no basis upon which to act and its

> determination, therefore, would unavoida
> be arbitrary. (emphasis added)
>
> ...
>
> A disciplinary proceeding will be voided and the status quo ante restored when there has been some error that taints the entire proceeding. This would not be an isolated mistake, but rather would strike at fundamental concerns such as jurisdiction or bias of the presiding officers ... (cases cited). In other words, these are errors that undermine the validity of the whole proceeding because they call into question the power or neutrality of the hearing officer or removing entity or because they effectively preclude any meaningful judicial review. This situation simply does not arise when a hearing officer acts pursuant to a valid delegation, prepares a detailed report, and provides it along with a transcript to the removing board or officer, but omits including recommendations as to discipline. (emphasis added)

Nowhere, at no time was there a written or even verbal statement that Referee Gutman was "designated in writing" to hear the case as Referee.

Nowhere, at no time was there a written or even verbal statement that Vice President, Labor Relations George

Buckley was "designated in writing" to rule on the matter of "the effective date of the said Respondent's dismissal."

Thus, fundamentally, Morgan v. United States, 298 U.S. 498 (1935) was once again treated with disdain and contempt: "He who decides must hear" was signally ignored! The landmark ruling of Morgan respecting Administrative Hearing Tribunals is abjured.

* * *

The jurisdiction to make the order appointing the commissioners, or referee as herein, must appear affirmatively from the record. Miller v. Brown, 56 N.Y. 386, 5 Wheat. 118; People v. Williams, 36 N.Y. 441; Fitch v. Comrs., 22 Wend. 132. There is no presumption of regularity in a proceeding by which a citizen, such as petitioner Charles DeMartino herein, is to be deprived of his property without his consent. People v. Hynds, 30 N.Y. 470.

Historically, in addition to the cited cases, Id., as early as 1836 the Court of Appeals in People v. Williams, 36 N.Y. 441, reversed a judgment of the Supreme Court and vacated an order in which only two of the three highway commissioners had participated in. Their ruling was succinct: "When these requirements (of the statute) are disregarded, an order made by two of the commissioners has no legal validity or force. Marble v. Whitney, 28 N.Y. 297, 304; People v. Hynds, 30 N.Y. 470, at 472." Surely, here the order made by someone not designated, to wit, George Buckley, Vice President Labor Relations, as herein, cannot be countanced. It is a jurisdictional defect. The critical date for the effective dismissal of Charles DeMartino, petitioner herein could not, jurisdictionally, be made by George Buckley, not designated in writing to make such determination! Such date for removal is void,

especially where the learned Referee candidly stated; "There was some discussion at the hearing of June 26, 1986, concerning the effective date of the said Respondent's dismissal. In my opinion, that is not a matter for me to determine." The Referee who heard "some discussion" "concerning the effective date of said Respondent's dismissal" abdicated his responsibility to rule on same. His view that "In m opinion, this is not a matter for me to determine", is disigenuous Worse, referring such evidentiary matter for decision to someone WHO HAD NOT HEARD NOR BEEN PRIVY TO THE HEARING, SURELY IS A JURISDICTIONAL LAPSE OF MAGNITUDE. People ex rel. Harvey v. Partridge, 180 N.Y. 237; Gilbert v. York, 111 N.Y. 544; Frees v. Ford, 6 N.Y. 176.

Such violation of "Due Process of law" is not restricted to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or

property, "whether the proceeding be judicial, admistrative, or executive in its nature". Stuart v. Palmer, 74 N.Y. 183, 190-191. Nor can the petitioner herein be limited or defeated in his fundamental rights by having been afforded "a quick but sham hearing and determination", as herein. (emphasis added) Sinicropi v. Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, at p.815. Of course, where subject matter jurisdiction is totally absent, as herein, a "sham" hearing is superficial by contrast, even, although, Sinicropi teaches us that a sham hearing suffices to reverse an adverse ruling to petitioner in a case like the present!

Point 3

THE UNANIMOUS ORDER OF THE APPELLATE DIVISION RETURNED PETITIONER CHARLES DeMARTINO TO HIS PRE-PENALTY STATUS, THAT OF AN OFFICER OF THE TRANSIT AUTHORITY POLICE IN GOOD STANDING; YET ANALYSIS REVEALS AN ADAMENT REFUSAL TO HONOR THAT RULING OF THE APPELLATE JUDICIAL TRIBUNAL BY RESPONDENT NEW YORK CITY TRANSIT AUTHORITY, ITS AGENTS, SERVANTS, EMPLOYEES

This case arises out of an Order of the Appellate Division vacating departmental discipline held against petitioner by respondent's New York City Transit Authority's Hearing Refereé. The Appellate Division ruled that the penalty found against petitioner was improper because the Hearing Officer considered matters outside the record in determining his penalty "findings." The action of the Appellate Division, February 18, 1986, restored petitioner to his pre-penalty status, that of an officer of the Transit Police in good standing.

Respondent Transit Authority has, nonetheless, "honored" this Order and Judgment only by completely disregarding it. Respondent does not acknowledge that the penalty found by its Hearing Officer has been vacated. Instead, as recently as June, 1986, it asserted that petitioner has been dismissed as an Officer in a substantially-fraudulent communication to the New York City Employees' Retirement System. Respondent has not restored petitioner to active service. Respondent has not paid petitioner back-compensation nor compensation since he was restored to service pursuant to the mandate of the Appellate Division. See the leading case of Sinicropi v. Bennett, 92 A.D.2d 309 (2dDept.1983), O'Connor, J., with unanimous concurrency by Gibbons, J.P., Weinstein and Boyers, JJ. The truly learned and dispositive enunciation by the Appellate Division was thereafter unanimously affirmed, 60 N.Y.2d 918, in a unanimous Memorandum by Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons

and Kaye concurring. It is regrettable that respondents do not feel bound by decisions of the Appellate Division or that of the Court of Appeals.

Analysis of the relevant portion of the Appellate Division's Judgment herein is illuminating:

> The decretal paragraphs stated:-
>
> "ORDERED, ADJUDGED AND DECREED that the petition is hereby granted to the extent of vacating the penalty imposed, on the law, with costs, and the matter is hereby remitted to the respondent New York City Transit Authority for reconsideration of the issue of an appropriate penalty in accordance with the said opinion and decision slip of the court herein dated February 18, 1986."

To date there has only been selective compliance with that Order and Judgment of the Appellate Judicial Tribunal in the State of New York (Second Department). In lieu of forthright, mandatory compliance by the named respondents herein, we have nothing less than an unlawful, near-anarchistic stone-walling! Even a brief analysis fortifies

this conclusion. A seriatim showing of what has not been done, what has not transpired to date should prove compelling. Reference, at all times is to the Order and Judgment of February 18, 1986.

1. "... the petition is hereby granted to the extent of vacating the penalty imposed, on the law, with costs ..."

ANALYSIS: The penalty imposed had been dismissal of petitioner as of January 31, 1984 to take effect January 31, 1984, from the Police Department of the respondent New York City Transit Authority.

"... vacating the penalty imposed" can mean nothing less than annuling, nullifying, expunging, discarding the Order of Dismissal. That was not done. Respondents, and none of them, contend it was done. The Transit Authority records must reflect such vacature of the penalty imposed. On information and belief, they do no. This was not done. No compliance with the Order and Judgment of the Appellate Division (Second Department).

"on the law" means a statutory vacating of the penalty imposed. It comprehends a full, unreserved, forthright compliance with the Judgment and Order of the Appellate Division dated February 18, 1986. This was not done. No compliance with the Order of the Appellate Division (Second Department).

2. The Order and Judgment of the Appellate Judicial Tribunal dated February 18, 1986 then states:

> "... and the matter is hereby remitted to the respondent New York City Transit Authority for reconsideration of the issue of an appropriate penalty in accordance with the said opinion and decision slip of the court herein dated February 18, 1986. (emphasis added)

It is clear, evident and persuasive the conjunctive "and" and the word "reconsideration" explicitly orders respondent New York City Transit Authority, which must include its agents, servants and/or employees named herein, to wit, New York City Transit

Authority, Hon. Daniel Gutman, Hearing Referee, New York City Transit Authority Trial Board, Jim Buckley, Vice President, Labor Relations, New York City Transit Authority, to follow compliance with the stated terms cited in paragraph "1" above.

There can be no reconsideration UNLESS the said Order and Judgment is complied with, to wit, "vacating the penalty imposed."

Only then do the orders for remittance to the respondent New York City Transit Authority for "reconsideration" make sense. The first penalty "imposed" of January 31, 1984 will have been vacated, expunged, nullified. Only then does "reconsideration" emerge into legal focus. (By definition, "reconsideration" means once again to consider anew.) In other words, upon "vacating the penalty imposed", and only then, does respondent New York City Transit Authority have the duty to "reconsider" what, if any or different penalties or the same penalty is then to be "imposed."

The clarity of the Appellate Division's Order and Judgment is manifest.

Significantly, the respondent City of New York Transit Authority (a) did not appeal from the Appellate Division's Order and Judgment; (b) did not seek clarification of the Appellate Division Order and Judgment.

The failure to appeal the Order and Judgment herein of February 18, 1986 is an implicit promise by respondents and each of them to comply in fullest measure with all of its decretal paragraphs, its words, its mandates, expressed and implicit therein.

To ignore and flaunt such Order and Judgment is a frightening omen of a kind of criminal anarchy and contempt for lawful, dispositive Court Orders and Judgments of the State of New York second highest Judicial Tribunal.

There is no compliance with the most fundamental decrees of the Judgment and Order of the Appellate Division for the Second Judicial Department, where respondent New York City Transit Authority is situate.

Ineluctibly, failure to seek clarification, to appeal from, to move against the Appellate Division's Judgment and Order by respondents and each of them is an implicit promise by respondents and each of them to comply in fullest with its decretal paragraphs, its words, its mandates.

There is, by contrast, nothing less than a naked implicit assertion herein: "We are above the law. The law of the Sovereign State of New York has no relationship to us. We do not have to heed, to abide by, to obey, to comply with a mere Order and Judgment of the Sovereign's second highest Judicial Tribunal! Nor do we have to read, follow, obey and comply with analytical, straightforward leading case law of the Second Judicial Department's Appellate Division of the Supreme Court of the State of New York, to wit, Sinicropi v. Bennett, 92 A.D.2d 309 (1983), nor its unanimous affirmance by the Court of Appeals, 60 N.Y. N.Y.2d 918 (1983)."

As has been written and Judicially stated by our highest Judicial Tribunal: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. And, as Mr. Justice Brandeis, dissenting, memorably said, in Olmstead v. United States, 277 U.S. 438,485 (1928):

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Contemplating the full significance of the above must make any contemplative person sick at heart. Such deliberate, contemptuous disobedience of Judicial Mandates and Rulings from City servants is indeed frightening in the Constitutional context. Its implications herein go far beyond the ambit and resolution of this truly simple case in any context of ad-

herence to Law and Order and even minimal respect for our State's Judiciary. It should not be tolerated. The State Appellate Tribunal need only have considered the searing words of Justice Brandeis. The "Government" here is the New York City Transit Authority. Its deliberate actions and proceedings have herein sent a clear message: It has herein become a law breaker. It has herein "breed(s) contempt for law." It has herein, effectively "invit(ed) every man to become a law unto himself; it invites anarchy." That such is not the way of petitioner Charles DeMartino needs no qualification. But this Judicial Tribunal must, it is respectfully submitted, incisively etch into the consciousness of respondents and each of them that respondent New York City Transit Authority must follow the law. To settle for less would yield to the very prophetic, classic warning by Justice Brandeis and emasculate the cornerstone of all law: The

imperative of Judicial integrity. There can be no greater bulwark to the integrity of our Democratic and Constitutional Polity. Respondent New York City Transit Authority, its agents, servants and employees will thereby not be afforded the option of flaunting the Order and Judgment of the Appellate Division, Second Judicial Department and then appear before it to belatedly argue a different result.

Point 4

THE HEARING HEREIN BEFORE HON. DANIEL GUTMAN, NEW YORK CITY TRANSIT AUTHORITY HEARING REFEREE, REVEALS FORCEFUL, CONSISTENT, DOCUMENTED PROOFS THAT JURISDICTION OF THE SUBJECT MATTER NEVER EXISTED, AND IN PERSONAM JURISDICTION WAS NOT CONFERRED UPON THE "IN-HOUSE" ADMINISTRATIVE TRIBUNAL

Hearings, allegedly pursuant to the Appellate Division Order and Judgment of February 18, 1986, were held on June 19 and June 26 of 1986. Hearings on those cited dates were conducted "In the Matter of Charges Preferred Against Charles DeMartino, Police Officer." This Cournsel, on behalf of Charles DeMartino, at all times articulated strong, consistent, documented proofs that the Hearing Officer never acquired subject matter jurisdiction, and that in personam jurisdiction was never conferred. Hearing highlights follow:

Transcript of June 19, 1986: (Page numbers follow - all emphasis added.)

> MR. POLUR: Your Honor, if I may, respectfully, I'd like to address the jurisdiction of the Court, not meaning to interfere with your rights here. (Very first words uttered!)(2)
>
> MR. POLUR: I'm submitting that. (Appellate Division Order re Charles DeMartino, dated February 18, 1986). I'm not submitting to the Court's jurisdiction by submitting that, and I would respectfully address myself to that first parameter. (3-4)
>
> Very respectfully, the initial request here, Your Honor is ... there is no jurisdiction in this Court, in our opinion, for the following reasons
>
> The initial request must be responded to affirmatively by the Court, to wit, legal status of the Respondent, Charles DeMartino. Unless he is already reinstated, and unless he is on the Transit Authority payroll as a Transit Police Officer, pursuant to the ruling of the Appellate Division of February 18, 1986, very respectfully, there is simply no jurisdiction-power, and authority for this Court to proceed in that, if he is not on the payroll of the Transit Authority, he's not reinstated, he's (4) not a police officer, this Court, this tribunal has no power to hear anything. ...
>
> Very respectfully, Your Honor, we deem a second jurisdictional failure, here. First, unless Your

Honor affirmatively shows it has jurisdiction based on what I have said. The second fundamental jurisdiction request is that of the Transit Authority Legal Department to come in here and try to impose jurisdiction on the Court or ask the Court to intercede without showing affirmative compliance of the solemn order of the unanimous Appellate Division Court order of February 18th, 1986. (5)

In this very matter, they cannot come in and show selective adherence to that order and total abrogation of the entire order. In terms of the jist (sic) of what it said, "vacating the penalty imposed," which the cases have unanimously held, means reinstatement to his former position.

Again, I'm not arguing the merits; not even the law, this jurisdictional question, that's all I'm raising. I'm saying that the Transit Authority has no power by it's own volitional acts to confer jurisdiction on this Court by selective compliance with that order and unless the Court can inform this attorney on behalf of Officer DeMartino that he is reinstated, that he is on the payroll, that the order of the Appellate Division of February 18th, 1986 has been fully complied with, there is no way this Court can rule on (6) the matter before it.

HEARING REFEREE: I deny that application. ...

MR. POLUR: I respectfully -- I think that if Your Honor does not show affirmative jurisdiction, I cannot impose jurisdiction by proceeding with this case.

...

MR. POLUR: I think, I cannot Your Honor -- (all, 7)

MR. POLUR: Your Honor, I'm not going to stay on the merits of the case at all. ... I think there is no authority for this tribunal, and I respectfully ask Your Honor to tell me where it has jurisdiction in view of that order.

...

MR. POLUR: If he's going beyond the jurisdictional question (Attorney for TA), we're leaving.(8)

MR. SCHIFFRIN: ... My position in behalf of the Authority is that Your Honor's ruling is correct and that you do have jurisdiction. I'm prepared to explain why, if that becomes necessary. (sic) ... (9)

MR. SCHIFFRIN: ... So, Your Honor, I claim there is full jurisdiction, and Your Honor, I also claim that Mr. DeMartino is not back on the Authority's payroll as Counsel would like to intend, pursuant to relevant case law. ... (12)

MR. POLUR: There is a jurisdictional question. (14) ...

MR. POLUR: Your Honor, very respectfully, the only issue I'm addressing, the jurisdiction of this respected tribunal, and this distinguished Jurist, that's all I'm

concerned with. I'm not responding only for that reason. (As to factual questions or legal questions going to the merits.)
The issue's very simply, in my considered judgment. If Officer DeMartino if there is no departmental order, a personnel order, with a number on it, saying he's on the Force, how can this tribunal hear the case? You can only hear it if the man is on the Force.(15

MR. POLUR: I'm not against that, but there is a jurisdictional statement. I'm not going into the merits if the Court has no jurisdiction. (16)

Very respectfully, Your Honor, it's a very simple ...
The United States Supreme Court, in every printed opinion says, jurisdiction covered by 28 U.S.C. Section 1847 and so forth. No court can hear anything without saying affirmatively, we have jurisdiction. I respectfully contend there is no jurisdiction, if he's not affirmatively on the payroll It is not a department -- (17)

Transcript of June 26, 1986: (page numbers follow: All Emphasis Added)

MR. POLUR: Can I just state my objection at this time, Your Honor, and exception to the ruling (that the Referee had jurisdiction to proceed) and also, I would very respectfully ask the distinguished Jurist what the grounds for denying my sixteen page decision that the Court had no jurisdiction and that the Court had --

HEARING REFEREE: ... my decision is based on two factors. One, that the Respondent, Mr. DeMartino was still an employee of the Transit Authority, and ... that is in accordance with the opinion and decision slip of the Appellate Division Second Department, dated February 18th 1986. (31)

MR. POLUR: May I just very respectfully ask the Court if there is an order, a personnel order, or a calendar action reflecting the order of dismissal being vacated, Your Honor, in order to make him a present employee, and as corollary of that, I would like to know whether it's retroactive to January... (31-32)

HEARING REFEREE: I'm not going to make a determination in that direction I think, since the matter is in the Supreme Court, before Justice Spodek, it is something for him to decide as to the correct effective date of the decision. So, I'm not making this retroactive.

...

HEARING REFEREE: I'm not denying it, I'm not granting it. I am not taking a position on it. (35)

MR. POLUR, Well, I'm talking about .. the vacature of the dismissal. I think very clearly, if you follow the Appellate Division ruling, you vacate the dismissal, that means he's automatically reinstated as of that date, as a matter of law. It can't mean anything else, Your Honor. (36-37)

MR. POLUR: In this respect, Your Honor hasn't said there is a personnel order. Is Your Honor issuing a personnel order?

HEARING REFEREE: I don't issue personnel orders. (37)

MR. POLUR: Is Your Honor instructing the appropriate office to issue it? How can it take effect without a personnel order? (37-38)

MR. POLUR: Is that without the personnel order, and a number showing that he is appropriately here, Your Honor, that is the issue, here, there is no jurisdiction. (39)

HEARING REFEREE: He's appropriately here by reason of being here.

MR. POLUR: We're here to object to jurisdiction here, we're saying you haven't shown me one case, one rule of law that gives you jurisdiction. Based on what I submitted, Your Honor, the thirty-two pages -- (40)

MR. POLUR: Your Honor, still, since the Court has not given me a single case or authority for saying there is jurisdiction, merely, you, the Court, without a single authority, when I submit a twenty-two page memoranda, as I promised you --

...

MR. POLUR: Your Honor, if he isn't an employee of the Transit Authority. He's not here right now, except to argue jurisdiction. That's the only basis we're here, Your Honor. (41)

We didn't suggest one attribute of the case.

He's (Charles DeMartino) here to see if he is an employee. If there isn't an order, he has no right to be here, he's no different than a garbage collector, or a doctor, on the street, doing something and hailing him before this Court. There can only be an employee of the Transit Authority. ... (42)

MR. POLUR: Here's the fire, Your Honor. This order of the Appellate Division cannot be selectively complied with, they're in contempt of Court, both criminally and civilly.

MR. POLUR: There is no calendar action reflecting -- (43)

MR. POLUR: I'm saying all my objections that the Court has no jurisdiction, and it's a very distinguished Court, and has refused to cite a single case or statute in opposition to the twenty-two pages of law submitted and the Supreme Court of the United States has said there is no jurisdiction, here, effectively, because if he is not an employee, that's it. (44)

MR. POLUR: We're maintaining that continuous objection, Your Honor throughout, no jurisdiction. (44-45)

MR. POLUR: First, of course, no personnel order, no calendar action order. ... (45)

MR. POLUR: Now, for the record, Your Honor, I just want to make sure there is no question of my position of this Court, the Transit Authority, that is, refusal to comply fully with the Order. I think it's a matter of substance of law. They are just hop-skipping over the first part of the ruling without which the second part has no efficacy, none whatsoever. (47)

It really doesn't belong here, until that first part is complied with, because they are connected by the words, 'and, a conjunctive', and not a 'disjunctive.' (47)

I think it's -- and I respect the Court immensely, but I think it's a grievous error. I think it's a very pre-determined anarchistic attitude of the Authority and/or Counsel. I think they are saying that the law doesn't apply to us, we don't have to pay attention to it. (47-48)

MR. POLUR: ... Your Honor, I think that it would be very appropriate and I understand this happened many, many times at hearings, to permit Mr. Charles DeMartino to retire, pursuant to the retirement laws, and as best pension rights that might avoid a hearing altogether. ...

HEARING REFEREE: That isn't in my power.

MR. POLUR: You won't accept his retirement? (48)

HEARING REFEREE: I can't accept or reject it.

MR. POLUR: Or recommend it before the hearing starts, as an alternative?

HEARING REFEREE: Not, it's not in my authority to do that. (49)

MR. POLUR: I think that everything we've said expresses our viewpoint that the Court hasn't got jurisdiction. (53)

MR. POLUR: Well, Your Honor, my position is that I don't want to submit my client's jurisdiction to the Court, when we say it doesn't have it. I can't argue on the merits and it's the only reason I do not do that. I believe that the Court is mindful of fair play and we will do it as is appropriate.

MR. POLUR: I don't know what more I have to say. I'm not going to argue on the merits. I've said this Court doesn't have jurisdiction, and --- (59)

MR. POLUR: I'd like to say, I'm not accepting the veracity (sic!) or the, if you will correct statement as to anything that's been said by the other side, and by the other side, I mean the Transit Authority, Counsel or Ms. Johnson. Nothing personal. but I'm not -- I want the record to show that I'm not challenging it, I don't accept anything as being properly, judicially entered.

> I don't think there was a proper evidentiary basis of anything that was put into the record, and I say the decision cannot be on the merits at all. There was nothing here, on the record, concerning the merits and there was no proper submission of evidence or any documents, and I want the record to reflect that, even though we're not part of it. I'm not challenging the merits of the argument, or anything, I'm just talking about the substance of the matter, what I alluded to, the submission and other aspects of the hearing, which I repeat, there was no jurisdictional basis whatsoever. (60-61)

The United States Court of Appeals for the 9th Circuit, in Rankin v. Howard, 633 F.2d 844(1980), spoke profoundly to this issue of in personam jurisdiction:

> "An absence of personal jurisdiction may be said to destroy 'all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute." at 848.
>
> "If a court lacks jurisdiction over a party, then it lacks 'all jurisdiction' to adjudicate that party's rights, whether or not the subject matter is properly before it. Rankin, at 848, and cases cited therein.

THIS COURT, RESPECTFULLY, MUST RULE ON THE CONSTITUTIONAL LACUNA PRESENTED BY THE FAILURE TO ADDRESS THE SUBSTANTIVE ISSUE OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW RIGHTS. WITHOUT SAME, THE RULE OF LAW IS DEEMED A NON-SEQUITER!

C O N C L U S I O N

1. This Court should find that Respondent New York City Transit Authority lacked subject matter and in personam jurisdiction because of the failure to "cut" another Personnel Order reflecting petitioner's status as a Transit Police Officer before holding said remitted disciplinary proceeding wherein, in this case, petitioner was merely a CIVILIAN.

2. This Court should find that Respondents NYCERS, WEIL, NYCTA and NYCTA Respondents, and each of them, severally and jointly,

conspired to deprive petitioner of his lawfully due pension rights through the usage of knowingly false affidavits and fraudulently stamped official documents.

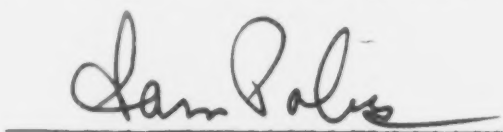
3. This Court should find that Respondents Gutman and Buckley were, neither of them, designated in writing to hear and/or determine the outcome of the specific hearing for Charles DeMartino, thereby divesting NYCTA of the jurisdiction it allegedly possessed.

4. This Court should find that the Respondents herein, and each of them, severally and jointly, deprived petitioner of his lawful property and property rights without Due Process and Equal Protection of the Law, thereby violating petitioner's Fifth and Fourteenth Amendment Rights pursuant to the United States Constitution.

5. This Court should overturn and reverse the Court below and the New York City Transit Authority, Order petitioner re-instated as a Transit Police Officer pursuant to a new Personnel Order being cut and thereafter Ordering NYCERS to grant petitioner's retirement application; together with all other further and different relief as to this Court seems just, proper and equitable in the premises.

Respectfully submitted,

DATED: February 25, 1990



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